In the Supreme Court of the United States

No. 78-722

UNITED STATES OF AMERICA,
Respondent,

vs.

DAVID ALLEN STARR,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

List of Authorities Cited

Cases

Others

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit finalized in an Opinion filed August 3, 1978. The United States Court of Appeals affirmed the United States District Court, Southern District of Iowa, holding that an indictment which failed to allege an essential element of the offense charged is sufficient since the indictment alleged conspiracy to commit the offense.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was filed Aug ıst 3, 1978, No. 78-1222, and is reported at ..... F.2d ..... (8th Cir. 1978), and rehearing was denied on October 6, 1978.

JURISDICTION

The final Opinion of the United States Court of Appeals for the Eighth Circuit was made and entered into on August 3, 1978, and a copy of the Opinion is appended to this Petition. (Appendix, infra, pages A1-A10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indictment which fails to allege intent in the substantive offense underlying a charge of conspiracy is sufficient.

STATUTES INVOLVED

Title 21, United States Code, Section 846

Title 21, United States Code, Section 841(a)(1)

Title 21, United States Code, Section 841(b)(1)(b)

STATEMENT OF THE CASE

On January 31, 1978, a superseding indictment was returned by the Grand Jury against this Petitioner, David Allen Starr, charging him with two violations of Title 21 U.S.C. §846. Count I of the indictment stated:

> "From on or about the 13th day of December, 1976, and continuously thereafter up to and including the 20th day of February, 1977, in the Southern District of Iowa, and elsewhere defendants RICHARD KENT LINDENMEYER, DAVID ALLEN STARR, JAMES ANTHONY CONWELL, and MICHAEL ROBERT

> BRODERS, willfully and knowingly did combine, conspire and agree together and with Harrie and Mae Burr and Michelle Kay Todd, named as co-conspirators but not as defendants herein, and with other persons to the Grand Jury unknown, to distribute methglemedioxyamphetamine sulfate (MDA), a Schedule I controlled substance, in violation, Title 21, United States Code, Section 841(a)(1) and Section 841(b)(1)(b)."

The statute (Title 21 U.S.C. §841(a)) the Petitioner allegedly conspired to violate states:

> "Except as authorized by this subchapter, it shall be unlawful for any person *knowingly or intentionally* (1) to manufacture, distribute, or dispense or possess with intent to a controlled substance . . ." (Emphasis added)

Section 841(b)(1)(b) is a punishment provision and does not state a substantive offense.

Attention is directed to the failure of the indictment to allege the requisite intent of the petitioner required by §841(a)(1) in that it did not allege that petitioner Starr knowingly or intentionally distributed or possessed a controlled substance in violation of §841(a)(1). It is submitted that because the indictment is totally defective, petitioner Starr's conviction must be reversed.

The Opinion of the United States Court of Appeals for the Eighth Circuit filed August 3, 1978 concludes that if the indictment under Count I had merely alleged a substantive offense under 21 U.S.C. §841(a), the Court would be constrained to agree to appellant Starr's contention. However, the Opinion goes on to state that the Count charges a conspiracy and that various circuits have relied

upon *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927) to hold that even when a conspiracy indictment fails to allege an essential element of the substantive offense, which is the object of the conspiracy, the indictment is valid. The Court then cited cases from three jurisdictions and then indicated that two circuit courts have held that the omission of an element of the substantive offense, which is the object of the conspiracy, renders the indictment invalid. The Court then concluded that the Eighth Circuit would join the three circuits which had held that it was not necessary to allege all of the elements of the offense in the crime underlying the conspiracy indictment. Therefore, the Opinion of the United States Court of Appeals for the Eighth Circuit affirmed the trial court in refusing to dismiss the indictment for the alleged insufficiency.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Eighth Circuit Has Rendered a Decision in Conflict With the Decisions of at Least Two Other Courts of Appeals on the Same Matter; and That Now a Total of Six of the Ten Circuits Have Decided This Issue and Are in Conflict on the Application of the Rule Stated in *Wong Tai* v. *U. S.*, 273 U.S. 77 (1927) **to the Effect That It Is Not Necessary to Allege With Technical Precision All the Elements Essential to the Commission of the Offense Which Is the Object of the Conspiracy.**

The statement in *Wong Tai* v. *U. S.*, 273 U.S. 77 (1927) to the effect that it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, is in itself,

capable of two interpretations: (1) that the elements of the offense need not be technically stated, but that all of them must be set forth; or (2) that all of the elements need not be set out at all in the event of a conspiracy indictment.

Various courts of appeals have interpreted that decision in one of the two ways suggested, resulting in a conflict between the circuits. Two circuits have held that the omission of an element of the substantive offense, which is the object of the conspiracy, renders the indictment invalid. *Nelson* v. *United States*, 406 F.2d 1136 (10th Cir. 1969); *United States* v. *Calhoun*, 257 F.2d 673, 680-81 (7th Cir. 1958).

On the other hand, the total of four circuits have now relied upon *Wong Tai* to hold that even when a conspiracy indictment fails to allege an essential element of the substantive offense, which is the object of the conspiracy, the indictment is valid. *United States* v. *Pheaster*, 544 F.2d 353, 359-63 (9th Cir. 1976), *cert. denied*, 419 U.S. 1099 (1977); *United States* v. *Fischetti*, 450 F.2d 34, 40 (5th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *United States* v. *Mixon*, 374 F.2d 20, 21-22 (6th Cir. 1967).

It is urgently requested that the United States Supreme Court take certiorari of this latest opinion of the Eighth Circuit Court of Appeals to determine this issue and resolve the conflict between the circuits. The case itself presents a clear question since there is no way of reading Count I of the indictment to suggest that any language indicates the element of intent. In other words, the case presents a clear-cut question on the legal issue which divides the circuits and affords the Court an opportunity to resolve the conflict.

CONCLUSION

For the important reasons assigned, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1222

United States of America,
Appellee,

v.

David Allen Starr,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa

Submitted: June 15, 1978
Filed: August 3, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and HENLEY, Circuit Judge.

STEPHENSON, Circuit Judge.

David Allen Starr appeals his jury conviction on one count[1] of conspiracy (alleged under 21 U.S.C. § 846) to

*The Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

1. Starr was found not guilty on a second count of the indictment alleging a conspiracy to use telephones and telegraphs to facilitate the distribution of MDA.

distribute methylenedioxyamphetamine sulfate (MDA), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1).[2] Starr contends (1) that the indictment failed to allege an essential element of the offense charged and was therefore defective, and (2) the district court abused its discretion in denying Starr's motion for severance. We reverse in part and remand.

On November 30, 1977, the grand jury returned an indictment against appellant Starr, Richard Kent Lindenmayer, James Anthony Conwell and Michael Robert Broders. On January 31, 1978, a superseding indictment was returned against appellant Starr and the three others. Count I of the indictment, which charged a conspiracy to violate 21 U.S.C. § 841(a), in violation of 21 U.S.C. § 846, stated:

> From on or about the 13th day of December, 1976, and continuously thereafter up to and including the 20th day of February, 1977, in the Southern District of Iowa, and elsewhere, defendants RICHARD KENT LINDENMAYER, DAVID ALLEN STARR, JAMES ANTHONY CONWELL, and MICHAEL ROBERT BRODERS, willfully and knowingly did combine, conspire and agree together and with Harriet Burr and Michelle Kay Todd, named as co-conspirators but not as defendants herein, and with other persons to the Grand Jury unknown, to distribute and possess with intent to distribute methylenedioxyamphetamine sulfate (MDA), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Section 841(b)(1)(B).

2. The Honorable William C. Stuart, Chief Judge, United States District Court for the Southern District of Iowa, presiding, imposed a six month sentence and a special parole term of two years.

Starr contends that knowledge or intent are essential elements of a substantive violation under 21 U.S.C. § 841(a). Count I, which charged a conspiracy to violate section 841(a), failed to charge that defendant knowingly and intentionally distributed MDA or possessed MDA with intent to distribute, an essential element of the substantive offense which was the object of the conspiracy. Therefore, according to Starr, Count I failed to set forth an essential element of the offense charged.

Rule 7 of the Federal Rules of Criminal Procedure requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), the Supreme Court stated "that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." In light of the Court's statement in *Hamling*, this circuit has held that an indictment, returned under 18 U.S.C. § 111, which omitted the word "forcibly," was insufficient. *United States* v. *Camp*, 541 F.2d 737 (8th Cir. 1976). Thus, if Count I had merely alleged a substantive offense under 21 U.S.C. § 841(a), we would be constrained to agree with appellant Starr's contention.

In the instant case, however, there is an added factor—the count charges a conspiracy. In *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927), the Supreme Court stated "that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy * * * or to state such object

with the detail which would be required in an indictment for committing the substantive offense * * *."

Various circuits have relied upon *Wong Tai* to hold that even when a conspiracy indictment fails to allege an essential element of the substantive offense which is the object of the conspiracy, the indictment is valid. *See United States* v. *Pheaster,* 544 F.2d 353, 359-63 (9th Cir. 1976), *cert. denied,* 419 U.S. 1099 (1977); *United States* v. *Fischetti,* 450 F.2d 34, 40 (5th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972); *United States* v. *Mixon,* 374 F.2d 20, 21-22 (6th Cir. 1967). *Accord, United States* v. *Mendoza,* 473 F.2d 692, 694-95 (5th Cir. 1972). Two circuit courts have held that the omission of an element of the substantive offense which is the object of the conspiracy renders the indictment invalid. *Nelson* v. *United States,* 406 F.2d 1136 (10th Cir. 1969); *United States* v. *Calhoun,* 257 F.2d 673, 680-81 (7th Cir. 1958).

This court has recently held that an indictment charging a conspiracy to violate 21 U.S.C. § 841(a) (in violation of 21 U.S.C. § 846) which omits the word "knowledge," is still a sufficient allegation to serve as fair notice to a defendant. *United States* v. *Wallace,* No. 77-1558 (8th Cir. June 18, 1978). As was true in *Wallace,* the defendant here was on clear notice that he was charged with a conspiracy, illegal under 21 U.S.C. § 846, to violate 21 U.S.C. § 841(a). *Compare Nelson* v. *United States, supra,* 406 F.2d at 1136-37 (the charge was brought under the general conspiracy statute). We note, as the court in *Wallace* similarly noted, that the draftsmanship of the instant indictment is not a paragon for future indictments. However, in light of our holding in *Wallace,* and *Wong Tai* and its progeny, *United States* v. *Pheaster, supra, United States* v. *Fischetti, supra,* and *United States* v. *Mixon, supra,* concerning the omission of the element of knowledge, we agree with the district court that the omission of the words "knowingly or intentionally" in the instant case is not fatal error.[3] *Compare Fulbright* v. *United States,* 91 F.2d 210 (8th Cir. 1937) (this court held that where the indictment did not charge and the proof did not show an essential element of the substantive charge the conviction must be reversed).

Appellant Starr secondly contends that the district court's denial of his motion to sever was an abuse of the trial court's discretion. *See United States* v. *Graham,* 548 F.2d 1302, 1310-11 (8th Cir. 1977); *Byrd* v. *Wainwright,* 428 F.2d 1017 (5th Cir. 1970); *United States* v. *Echeles,* 352 F.2d 892 (7th Cir. 1965).

The district court may grant a severance of defendants under Rule 14 of the Federal Rules of Criminal Procedure if it appears that a defendant is prejudiced by a joinder of defendants for trial together. *See United States* v. *Weir,* No. 77-1708, slip op. at 10-11 (8th Cir. May 17, 1978). As this court recently stated:

> It is settled in this circuit that a motion for relief from an allegedly prejudicial joinder of charges or defendants raises a question that is addressed to the judicial discretion of the trial court, and this court will not reverse in the absence of a clear showing of abuse of discretion. *United States* v. *Losing,* 560 F.2d 906, 911 (8th Cir. 1977); *United States* v. *Jackson,* 549 F.2d 517, 523 (8th Cir.), *cert. denied,* 430 U.S. 985 (1977); *United States* v. *Graham,* 548 F.2d 1302, 1311-12 (8th Cir. 1977); *United States* v. *Johnson,* 540 F.2d 954, 959 (8th Cir. 1976), *cert. denied,* 429 U.S. 1025 (1976). And in showing an abuse of discretion

3. The district court properly instructed the jury as to the essential elements of the count in question.

in this area a defendant shoulders a "heavy burden." *United States* v. *Graham, supra,* 548 F.2d at 1311; *see also Williams* v. *United States,* 416 F.2d 1064, 1070 (8th Cir. 1969).

Another relevant principle is that persons charged with having been involved in a single conspiracy should ordinarily be tried together. *United States* v. *Losing, United States* v. *Jackson,* and *United States* v. *Graham, all supra.*

United States v. *Rochon,* No. 77-1759, slip op. at 12-13 (8th Cir. April 26, 1978). *See United States* v. *Smith,* No. 77-1510, slip op. at 20-22 (8th Cir. May 17, 1978). Nevertheless, however desirable a single joint trial may be from the point of view of efficient and expeditious criminal adjudication, a joint trial may not be had at the expense of a defendant's right to a fundamentally fair trial. *United States* v. *Echeles, supra,* 352 F.2d at 896. Severance should be granted if there is a showing of real prejudice to a defendant. *United States* v. *Graham, supra,* 548 F.2d at 1310.

In the instant case one of Starr's codefendants, Richard Lindenmayer, testified before the grand jury on February 23, 1977, that he had obtained a pound of MDA from Starr in Moline, Illinois, on approximately the 19th of February 1977. Lindenmayer also testified as to numerous previous narcotics transactions between him and Starr, including one occasion where they transported MDA from Iowa to Colorado. On March 22, 1977, Lindenmayer testified again before the grand jury where the following colloquy between the Assistant United States Attorney and Lindenmayer took place:

Q. Mr. Lindenmayer, do you recall testifying before the Grand Jury approximately one month ago?

A. Yes, I do.

Q. That would have been on February 23, 1977, is that correct?

A. Yes, I believe so.

Q. Your discussion and your testimony before the Grand Jury dealt with certain alleged narcotics transactions involving an individual by the name of Mr. Starr, and another individual by the name of Mr. Broders; and certain interstate movements between the State of Iowa and the State of Colorado, is that correct?

A. Yes.

Q. Now, it is my understanding at this time that some of the testimony which you gave to the Grand Jury the last time was not truthful.

A. Right.

• • •

Q. What area of your testimony was not truthful?

A. Well, the part about Mr. Starr. He wasn't really involved in it. I had a reason and a purpose behind it for not saying so at the time.

Q. Now, your previous testimony indicated that you had purchased some MDA form of narcotics from Mr. Starr, is that correct?

A. Yes, sir, it was.

Q. You are now telling the Grand Jury that was not the truth, and you did not purchase the MDA from Mr. Starr, is that correct?

A. Yes.

Q. Who did you purchase this MDA from?

A. Michael Broders.

• • •

Q. Now, so your testimony previously that you purchased the MDA from Mr. Starr is incorrect?

A. Right.

Q. It's your testimony now that you received the MDA from Mr. Broders?

A. Right.

On January 30, 1978, appellant Starr, in a pretrial motion, requested the district court to sever his trial. This motion was based on the fact that during the omnibus hearing the government had indicated it would introduce the February 23, 1977, grand jury testimony of codefendant Lindenmayer during the course of the trial. Starr contended in his motion for severance that Lindenmayer had exonerated Starr in other grand jury testimony and that the introduction of Lindenmayer's grand jury testimony would deny Starr his right of cross-examination. Following Starr's motion for severance and the return of a superseding indictment by the grand jury, the government, on February 2, 1978, requested the district court to overrule the motion for severance as moot for the reason that the government did not intend to introduce the grand jury testimony of codefendant Lindenmayer.

On February 6, 1978, before the selection of the jury, appellant Starr asked the district court for severance on the grounds that (1) the indictment was partially obtained on perjured testimony, including testimony obtained from Lindenmayer prior to his exonerating Starr before the grand jury on March 22, 1977; (2) the superseding indictment absolved Starr of any implication in the sale of a pound of MDA; and (3) Starr was being prejudiced by being tried with other codefendants who may have used telephones or other interstate equipment in the distribution of drugs. Starr's motion was overruled.

The record further reflects that following the close of the government's case, appellant Starr renewed all his pretrial motions including the motion for severance. It was Starr's contention at this point that were it not for the fact that Starr and the other defendants were being tried together, Starr would have had the option of calling Lindenmayer regarding his testimony to the grand jury exonerating Starr. This motion was also overruled.

In this circuit, it is not reversible error to deny severance requested on the ground that a defendant wants to call a codefendant as a witness, unless the defendant shows that the codefendant is likely to testify at a separate trial and the testimony would exculpate him. *See United States* v. *Wofford*, 562 F.2d 582, 586 (8th Cir. 1977); *United States* v. *Graham, supra*, 548 F.2d at 1311 & n.9. Both of these requirements are satisfied in the present case. The fact that Lindenmayer was willing to exculpate Starr before the grand jury in sworn testimony demonstrates that it was at least likely that he would do the same in Starr's trial if he were not being tried in the same proceeding. It was not necessary for Starr to prove to a certainty that Lindenmayer would be available and willing to testify in a separate trial. *See United States* v. *Echeles, supra*, 352 F.2d at 898.

On the second requirement the Assistant United States Attorney now argues that Lindenmayer's grand jury testimony on March 22, 1977, exonerating Starr, was limited to the one pound transaction of February 19, 1977, and that the superseding indictment did not name Starr in connection with overt acts in furtherance of that transaction. Although the Assistant United States Attorney may have intended his questioning to be so limited, a fair reading of the questions asked Lindenmayer and his responses before the grand jury does not indicate that they

were confined only to the one pound transaction. On the contrary, the questions and answers broadly state that Starr was not involved in narcotics transactions with Lindenmayer. *See* pages 5-6, *supra*. On the record before us we are unable to say that if Lindenmayer testified at Starr's trial he would limit his testimony absolving Starr to the one pound transaction. On the basis of this record we conclude that Starr suffered real prejudice warranting a new trial separate from Lindenmayer.

We hold the superseding indictment on which appellant was tried is not defective but reverse and remand for new trial because of failure to grant appellant's motion for severance.

Reversed in part and remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 78-722

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID ALLEN STARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the District of Iowa, petitioner was convicted of conspiracy to distribute methylenedioxyamphetamine sulfate (MDA), in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B).[1] He was sentenced to six months' imprisonment and two years' special parole. The court of appeals rejected petitioner's claim that the indictment was defective, but it reversed his conviction and remanded the case for a new trial after concluding that petitioner's severance motion should have been granted (Pet. App. A1-A10).

---

[1]Petitioner was convicted on Count 1 of a two-count indictment; he was acquitted of a charge of conspiracy to use communications facilities to facilitate narcotics offenses, in violation of 21 U.S.C. 843(b). Co-defendant Lindenmayer was convicted on both counts. Count 2 was dismissed as to co-defendants Broders and Conwell prior to trial. Broders was convicted on Count 1; Conwell was acquitted on that count.

Count 1 of the indictment (Pet. App. A2) charged that petitioner and his co-defendants "willfully and knowingly did combine, conspire and agree * * * to distribute methylenedioxyamphetamine sulfate (MDA), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Section 841(b)(1)(B)." Although the indictment charges that petitioner "willfully and knowingly" conspired, petitioner contends that it was defective in failing to charge that the underlying offense, *i.e.*, distribution of MDA, was to be carried out "knowingly or intentionally," as Section 841(a) provides.

While there does appear to be a conflict among the circuits on whether a conspiracy indictment must allege that the defendant's conspiracy extended to every element of the underlying substantive offense (see *Nelson* v. *United States*, 406 F. 2d 1136 (10th Cir. 1969)), review is not warranted in this case. In the first place, the court of appeals remanded the case for a new trial and thus its ruling on the indictment is not ripe for review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

Second, this Court has denied certiorari in previous cases calling attention to this conflict. See, *e.g.*, *Inciso* v. *United States*, 429 U.S. 1099 (1977).

Finally, the United States Attorney advises us that, when the grand jury returns on January 23, 1979, she will seek a superseding indictment against petitioner charging that the object of the conspiracy was the knowing or intentional distribution of MDA. If such an indictment is obtained, petitioner will no longer be subject to the present indictment, and his claim will therefore be moot. We will advise the Court regarding the return of any susperseding indictment (assuming that one is returned) in the event that the Court has not acted on the petition by that time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-722

DAVID ALLEN STARR,
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vs.

UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried and convicted on one count of a "superseding indictment" returned by the grand jury (A-2). Petitioner appealed to the Court of Appeals, Eighth Circuit, raising two issues as stated in the opinion of that court:

> "(1) that the indictment failed to allege an essential element of the offense charged and was therefore defective, and
>
> (2) the district court abused its discretion in denying Starr's motion for severance." (A-2)

The Court of Appeals reversed on the second issue and remanded for a new trial.

However, the Court of Appeals, joining three other circuits, affirmed the trial court's ruling that the indictment was not defective. It is this latter issue which has now become "final" in the trial court and the Court of Appeals, Eighth Circuit, that Petitioner seeks certiorari.

The terse response of the United States in opposition to granting certiorari first admits that there is a conflict among the circuits. However, the Solicitor General then proceeds to argue that review is not warranted for three reasons; each of which will be separately addressed in this reply.

First, the Solicitor states that the case is not "ripe" for review because the Court of Appeals remanded *on another issue*. This argument essentially begs the question, because certiorari is always a discretionary writ. But if the Solicitor is arguing that the Supreme Court does not have *jurisdiction* to review the writ, then surely he is mistaken. 28 *USC* 1651 clearly grants the Supreme Court power to review this case, and in one of the many cases under this section, the Supreme Court exercised this power even though the circuit court had reversed for new trial, on the express grounds that it was advisable to review the judgment in its present posture "without further protracting the litigation." *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 US 117 (19.....). Further, the issue presented for review in this petition is "final" in the district court and court of appeals; but in the case cited by the government, the very issue sought to be reviewed was sent back to the trial court for a new trial. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 US 327 (1967).

Second, the Solicitor General states that this Court has previously denied certiorari on this conflict. Petitioner sees the prior denials of review on this issue as an argument *in favor* of granting certiorari. Presently, six circuits have split four to two on the issue (Petition, p. 5). While four circuits have not been heard from (apparently), at what point does the conflict need resolution? Suffice it to say that as each new circuit puts in with one side or the other, the need for resolution becomes more accute.

Thirdly, and finally, the government seems to confess the error in the first superseding indictment by announcing that the United States Attorney will seek a second superseding indictment! Petitioner's response to that revelation is that he will not oppose dismissal of the present indictment; but that the filing of yet another superseding indictment will be vigorously resisted. It is always possible that one party to an appeal will "give up" during the pendency of the matter; but until that actually occurs, the reviewing court has no reason to fail to respond to the issues raised. One might suspect that the government, by seeking yet a third indictment in this criminal case, is desperately attempting to avoid review of this issue by this Court.

In light of the serious issues presented by the Petition for Writ of Certiorari, Petitioner respectfully submits that it should be granted.

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January, 1979